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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES DAVID THORNBRUGH,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, James David Thornbrugh, by his Assistant Federal Public Defender for the District of Colorado, respectfully requests this Honorable Court for leave to proceed in forma pauperis in applying for a Writ of Certiorari. As grounds therefore Respondent states that undersigned counsel was appointed pursuant to the Criminal Justice Act by the United States Court of Appeals for the Tenth Circuit and Petitioner is unable to retain counsel and pay for costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the petition respectfully requests that he be granted leave to proceed in forma pauperis.

Respectfully submitted,

MICHAEL G. KATZ
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Assistant Federal Public Defender
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UNITED STATES OF AMERICA,

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JAMES DAVID THORNBRUGH,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT FOR CERTIORARI

Respondent, James David Thornbrugh, by undersigned counsel, for his response to the Petition for Writ of Certiorari by the United States, as ordered by the United States Supreme Court, states the court as follows:

QUESTION PRESENTED

WHETHER FOR PURPOSES OF MULTIPLE § 924(c) CONVICTIONS, THE ENHANCED PENALTY OF 20 YEARS RATHER THAN 5 YEARS IS ONLY PROPER WHEN THE UNDERLYING OFFENSE HAS BEEN COMMITTED AFTER A JUDGMENT OF CONVICTION FOR THE PRIOR § 924(c) OFFENSE

TABLE OF CONTENTS

BRIEF IN RESPONSE TO PETITION FOR WRIT FOR CERTIORARI . . . i

QUESTION PRESENTED i

TABLE OF CONTENTS. . . . . .ii, iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT

FOR PURPOSES OF MULTIPLE § 924(c) CONVICTIONS, THE ENHANCED PENALTY OF 20 YEARS RATHER THAN 5 YEARS IS ONLY PROPER WHEN THE UNDERLYING OFFENSE HAS BEEN COMMITTED AFTER A JUDGMENT OF CONVICTION FOR THE PRIOR § 924(c) OFFENSE 2

CONCLUSION 6

AFFIDAVIT OF SERVICE 8

TABLE OF AUTHORITIES

CASES

United States v. Abreu-Thornbrugh,
962 F.2d 1447 (10th Cir. filed April 13, 1992) . . . 1-4, 7

United States v. R.L.C.,
503 U.S. _____ 117 L.Ed. 2d 559 (March 24, 1992) 6

United States v. Rawlings,
821 F.2d 1543 (11th Cir.),
cert. denied, 484 U.S. 979 (1987) 5, 6

Williams v. United States,
458 U.S. 279, 290 (1982) 4

STATUTES

18 U.S.C. § 924(c) 1, 2, 3, 7

21 U.S.C. § 962(a) 4

28 U.S.C. § 1254(1) 1

OTHER

Rules of the Supreme Court 10.1.(a) 6

OPINION BELOW

The en banc opinion in United States v. Abreu, United States v. Thornbrugh, 962 F.2d 1447 (10th Cir. filed April 13, 1992), is appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 13, 1992. A Petition for Writ of Certiorari was filed by the United States. Jurisdiction of the Supreme Court was invoked under 28 U.S.C. § 1254(1). By the Court's Order, Petitioner, Mr. Thornbrugh, was asked to respond.

STATEMENT OF THE CASE

Mr. Thornbrugh was indicted with three separate robberies and three separate charges under 18 U.S.C. § 924(c), use of a firearm in connection with those violent crimes. After jury trial, Mr. Thornbrugh was convicted of all the charges. At his sentencing, the district court calculated the bank robbery sentences under the Federal Sentencing Guidelines. The district court interpreted 18 U.S.C. § 924(c) as requiring enhanced penalties of 20 years for each of the two additional counts under § 924(c). Hence, the district court imposed 5 years, 20 years, and 20 years, for a total of 45 years on the § 924(c) counts, to run consecutively to the sentence for the robberies.

ARGUMENT

FOR PURPOSES OF MULTIPLE § 924(c) CONVICTIONS, THE ENHANCED PENALTY OF 20 YEARS RATHER THAN 5 YEARS IS ONLY PROPER WHEN THE UNDERLYING OFFENSE HAS BEEN COMMITTED AFTER A JUDGMENT OF CONVICTION FOR THE PRIOR § 924(c) OFFENSE

In its recent en banc opinion in United States v. Abreu, United States v. Thornbrugh, _____ F.2d _____, 1992 WL 720727 (10th Circuit, filed April 13, 1992), the Circuit held that for purposes of multiple § 924(c) convictions, the enhanced penalty of 20 years rather than 5 years is only proper when the underlying offense has been committed after a judgment of conviction on the prior § 924(c) offense. The circuit held the language of the statute is ambiguous, the legislative history is susceptible to more than one interpretation, and therefore the rule of lenity requires the Court to interpret the statute in the light most favorable to the defendant.

Section 924(c), 18 U.S.C., provides that whoever uses or carries a firearm in the commission of a violent crime or a drug trafficking crime should be sentenced to 5 years imprisonment. However, for a "second or subsequent conviction," the penalty is enhanced to 20 years.

The Tenth Circuit noted that "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Abreu-Thornbrugh, slip op. at 6. Second or subsequent can mean "multiple events occurring at the same point in time" or

refer to "two or more events that are sequential in time." Id. The textural ambiguity arising from the use of the words, "second or subsequent," is heightened by the fact that they modify the word "conviction" which is also not well defined. Id. at 7.

Had the statute used the phrase "second or subsequent offense," rather than "conviction," the statute would be more susceptible to the interpretation that an enhanced penalty should be imposed without the requirement of an intervening conviction prior to the commission of another § 924(c) offense. Had § 924(c) used the words "in the case of simultaneous convictions," rather than "second or subsequent conviction," the statute obviously would provide for enhanced penalties for convictions of § 924(c) obtained in one trial.

Therefore the Circuit held the language of the statute is ambiguous, and turned to the legislative history. Representative Poff stated, 114 Cong. Rec. 22231 (daily Ed. July 19, 1968), the intended effect of § 924(c)'s minimum mandatory penalty was:

> "To persuade the man who was tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time."

Because the legislative history can support either interpretation of the statute, the Circuit concluded the rule of lenity should be applied. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is

appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." Williams v. United States, 458 U.S. 279, 290 (1982). The Tenth Circuit stated that application of the rule of lenity is particularly appropriate in this kind of case where "second and subsequent offense statutes are admittedly harsh and must be strictly construed to avoid and protect against unintended applications." Abreu-Thornbrugh, slip op. at 10.

"Congress has enacted many statutes providing for enhancement on the basis of the commission of the second offense after a prior conviction." Id. at 12. For purposes of the sentencing guidelines and sentencing as a career offender, prior felony convictions are defined as based on "the date the judgment of conviction was entered." Id. at 13. The court found significant the sentence enhancement statute for illegally importing and exporting drugs, 21 U.S.C. § 962(a), which states that "a person shall be considered guilty of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of him under [laws relating to drugs] had become final."

On a philosophical note, the Tenth Circuit stated:

> "[C]onstruing 'second or subsequent convictions' to require that the offense underlying that conviction be committed after a defendant has received the judgment of conviction on the prior offense implements the legislative purpose upon which all such subsequent-offense statutes are grounded." Id. at 14.

* * *

> "A statute designed to punish a second offender more severely when he has not learned from the penalty imposed for his prior offense should not be construed to apply before that penalty has had the chance to have the desired effect on the offender. Id. at 15."

The opportunity for an offender to learn from his first offense or to rehabilitate himself is the general purpose of recidivist statutes. Congress was concerned with penalizing repeat offenders, individuals whose criminal offenses have been separated by convictions and likely periods of incarcerations. Congress did not intend to reach offenders, not convicted previously under § 924(c), who are charged in one indictment with more than one of these offenses.

The Tenth Circuit sitting en banc, struck its own path in deciding this issue, and rejected the reasoning in United States v. Rawlings, 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987). The Rawlings decision has been followed by the second, fourth, sixth, seventh, and eighth circuits.[1] The Rawlings court discussed the meaning of the statutory language and referred to legislative history, but did not discuss, consider or apply the rule of lenity.

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[1] United States v. Raynor, 939 F.2d 191 (4th Cir. 1991); United States v. Nabors, 901 F.2d 1351 (6th Cir.), cert. denied, 111 S.Ct. 192 (1990); United States v. Foote, 898 F.2d 659 (8th Cir.), cert. denied, 111 S.Ct. 112 (1990); United States v. Bennett, 908 F.2d 189 (7th Cir.), cert. denied, 111 S.Ct. 534 (1990); United States v. Bernier, 954 F.2d 818 (2nd Cir. 1992), pet. for cert. filed January 29, 1992 (No. 92-5025)

The Rawlings decision turned in part on that court's view that charging of all counts in one indictment insured judicial economy and avoided separate indictments and trials. The Rawlings court was concerned that the prosecutor could charge one bank robbery and a related gun charge in one indictment, obtain a conviction and thereafter seek further convictions for other robberies and related gun offenses committed prior to the first conviction. However, the requirement that a conviction under § 924(c) must precede commission of other offenses under that section for purposes of enhancement obviates the perceived problem.

CONCLUSION

Respondent Mr. Thornbrugh acknowledges that the Tenth Circuit en banc decision creates a split among the Circuit Courts of Appeals. While not controlling or fully measuring the Supreme Court's discretion, this is clearly a basis for granting certiorari. Rule 10.1.(a) Rules of the Supreme Court.

In addition, in United States v. R.L.C., 503 U.S. _____ 117 L.Ed. 2d 559 (March 24, 1992), Justice Souter applied the rule of lenity to interpret the Juvenile Delinquency Act, after finding the language of the statute and the legislative history ambiguous. This was the same analysis followed by the Tenth Circuit in the Abreu-Thornbrugh decision. Justice Scalia wrote a separate opinion in R.L.C., concurring in the result, stating his view that the rule of lenity should be applied upon a finding of ambiguity in the

statute without the necessity to first resort to legislative history. This Court may be interested in reviewing the Tenth Circuit's application of the rule of lenity in Abreu-Thornbrugh.

Therefore, Respondent Mr. Thornbrugh urges the Supreme Court to resolve the split among the circuits by upholding the Tenth Circuit decision in Abreu-Thornbrugh, and adopting its conclusion as to when enhanced penalties under § 924(c) can be applied.

Respectfully submitted,

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OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES DAVID THORNBRUGH,

Respondent.

AFFIDAVIT OF SERVICE

VICKI MANDELL-KING, Assistant Federal Public Defender, Chief, Appellate Division attests that pursuant to Rule 28, she served the preceding Brief in Response to Petition for Writ for Certiorari to the United States Court of Appeal for the Tenth Circuit and the accompanying Motion for Leave to Proceed In Forma Pauperis on counsel for the respondent by enclosing a copy of these documents in an envelope, first class postage prepaid and addressed to:

The Honorable Kenneth Starr
Solicitor General of the United States
Department of Justice
9th and Pennsylvania
Washington, D.C. 20530

and that the envelope was deposited in the United States Post Office, Denver, Colorado, 80201 on 9/22 92, 1992, and further attests that all parties required to be served have been served.

Vicki Mandell-King

VICKI MANDELL-KING
Assistant Federal Public Defender
Chief, Appellate Division

STATE OF COLORADO)
) SS.
COUNTY OF DENVER)

Subscribed and sworn to before me this the 22 day of September 1992.

Anna Lee Wymore

Notary Public

My Commission expires: 17 JAN 94

ATTACHMENT

PUBLISH

FILED
United States Court of Appeals
Tenth Circuit

APR 13 1992

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ORESTES LUCIANO ABREU, Defendant-Appellant.	)	No. 89-4145 (D. Utah)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES DAVID THORNBRUGH, Defendant-Appellant.	)	Nos. 89-5166 & 89-5173 (N.D. Okla.)

OPINION ON REHEARING EN BANC

No. 89-4145, United States v. Abreu, submitted on the briefs:

David K. Smith of Midvale, Utah, filed a brief for Defendant-Appellant Abreu.

Paul M. Warner, Acting United States Attorney, and Wayne T. Dance, Assistant U.S. Attorney, Salt Lake City, Utah; and Robert J. Erickson, Attorney, Department of Justice, Washington, D.C., filed a brief for Plaintiff-Appellee.

Nos. 89-5166 and 89-5173, United States v. Thornbrugh, argued:

Vicki Mandell-King, Assistant Federal Public Defender (Michael G. Katz, Federal Public Defender, with her on the brief), Denver, Colorado, for Defendant-Appellant Thornbrugh.

Robert J. Erickson, Attorney, Department of Justice, Washington, D.C. (Tony M. Graham, United States Attorney, Tulsa, Oklahoma, with him on the brief), for Plaintiff-Appellee.

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

SEYMOUR, Circuit Judge.

. The court, on its own motion, ordered rehearing en banc in these two appeals to consider the interpretation of the enhancement provision in 18 U.S.C. § 924(c)(1) (1988). The remaining issues raised on appeal are decided separately in two panel opinions filed simultaneously with this opinion. See United States v. Abreu, ___ F.2d ___ (10th Cir. No. 89-4146 filed April 13, 1992; United States v. Thornbrugh, ___ F.2d ___ (10th Cir. Nos. 89-5156, 89-5173, filed April 13, 1992).

I.

Orestes Abreu was charged in a second superseding indictment with one count of conspiring to possess cocaine with intent to distribute, one substantive count of possessing cocaine with intent to distribute, and four counts of using a firearm during and in relation to a drug offense in violation of 18 U.S.C. § 924(c)(1).[1] Two of the section 924 charges pertained to the conspiracy count; one of those charges alleged the use of a rifle, and one alleged the use of a revolver. The remaining two section 924 charges pertained to the count charging the substantive drug offense, which was also alleged to be an overt act in furtherance of the conspiracy. One of these section 924 charges alleged the use of the rifle during the substantive offense, and the other

[1] Abreu was also charged with failure to appear in violation of 18 U.S.C. § 3146(a)(1) (1988). He pled guilty to that charge and it is not at issue on appeal.

alleged use of the revolver. Abreu was convicted on all counts. In addition to the sentences imposed on the conspiracy and drug charges, the trial court sentenced Abreu on two of the section 924 charges. The court imposed a 60-month sentence on the count charging the use of a revolver during the substantive drug offense, and an enhanced sentence of 120 months on the charge alleging use of a rifle during the conspiracy offense, the sentences to run consecutively to the drug charges and to each other.

James Thornbrugh was charged in a six-count indictment with three counts of bank robbery, occurring on three different dates, and three section 924 counts, one pertaining to each of the alleged bank robbery offenses. He was found guilty on all six counts. In addition to giving Thornbrugh concurrent sentences on the robbery offenses, the court imposed a 60-month sentence on one section 924 count, and enhanced 240-month sentences on each of the other two, these sentences to run concurrently to the robbery sentences and consecutively to each other.

Abreu and Thornbrugh both raise the propriety of their enhanced sentences under section 924. That section currently provides in pertinent part:

> "Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly

> or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, ... In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . ."

18 U.S.C. § 924(c)(1) (emphasis added).[2] Defendants challenge the applicability of the sentence enhancement provision for a "second or subsequent conviction." The government urges this court to hold that the phrase "second or subsequent conviction" includes one of two separate offenses charged in the same indictment. For purposes of our en banc consideration, we asked the parties to address whether under 18 U.S.C. § 924(c) an enhanced sentence for a "second or subsequent conviction" may be imposed:

(1) when a defendant is convicted of two or more separate offenses charged in the same indictment regardless of when the offenses occurred; or

(2) only when a defendant is convicted of an offense that was committed in a subsequent transaction distinct from the conduct constituting the first section 924(c)

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[2] Abreu committed the offenses at issue on April 3, 1988. At that time, section 924(c)(1) provided for a mandatory sentence of five years on a first offense, and a mandatory sentence of ten years on a "second or subsequent conviction." See 18 U.S.C. § 924(c)(1) (Supp. V 1987). The statute was amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460(2)(A), 102 Stat. 4181, 4373 (Nov. 18, 1988), to provide a mandatory sentence of twenty years in the case of a second or subsequent conviction. See 18 U.S.C. § 924(c)(1) (1988). Thornbrugh committed his offenses in 1989 and was sentenced under the current version.

offense, without regard to when the first conviction occurred; or

(3) only when a defendant is convicted of an offense that was committed subsequent to an earlier conviction under section 924(c).

II.

In order to ascertain the meaning of section 924(c), we begin with the text of the statute itself. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979). "Second" is defined as "next to the first in place or time." Webster's Third New International Dictionary, 2050 (1981). "Subsequent" is defined as "following in time" or "following in order of place." Id. at 2278. Black's Law Dictionary, 1351 (6th Deluxe Ed. 1990), defines "second" as "sequence in point or time." "Subsequent" is defined as "[f]ollowing time; coming or being later than something else; succeeding." Id. at 1427. Thus, while the words "second" and "subsequent" can be arguably read to refer to multiple events occurring at the same point in time, both words can equally plausibly be read as referring to two or more than two events that occur sequentially in time.

The textual ambiguity arising from the use of the words "second or subsequent" is heightened by the fact that these words modify "conviction," a term not defined in the statute itself and which one court has described as "a chameleon." Harmon v. Teamsters Local Union 371, 832 F.2d 976, 978 (7th Cir. 1987). The Supreme Court has noted that "the terms 'convicted' or 'conviction' do not have the same meaning in every federal statute," Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983), rather, the terms "vary from statute to statute," id. at 113 n.7.[3] Indeed, this court has held that a conviction occurs upon entry of a guilty plea for purposes of 28 C.F.R. § 2.52(c)(2), which requires the Parole Commission to order forfeiture of street time if a parolee is "convicted" of a new offense punishable by imprisonment. See DeCuir v. United States Parole Comm'n, 800 F.2d 1021, 1023 (10th Cir. 1986). There,

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[3] The Court in Dickerson addressed the meaning of the term "convicted" in the Gun Control Act of 1968, 18 U.S.C. §§ 922(g)(1), (h)(1). At issue was whether a defendant was "convicted" within the meaning of the statute when he pled guilty to a state crime under a deferred sentencing procedure in which no judgment of conviction was entered. The Court there held as a matter of federal law that a person is convicted for purposes of the Gun Control Act upon a plea of guilty. This decision is not helpful to the instant inquiry for two reasons. First, the Court stressed that the Gun Control Act specifically applies not only to those convicted of a state crime, but to those who have only been indicted. See 460 U.S. at 115-16. The Court viewed the inclusion of indicted status as indicative of congressional intent that the term "convicted" be construed broadly. Section 924(c) has no comparable provision. Second, Congress has effectively overruled Dickerson in the Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 102(6), 104(b), 100 Stat. 449, 452, 459 (1986), which expressly adopts the particular state's definition of conviction. See United States v. Pennon, 816 F.2d 527, 529 (10th Cir.), cert. denied, 484 U.S. 987 (1987).

however, the regulation also stated that "[a]n actual term of confinement or imprisonment need not have been imposed for such conviction." 28 C.F.R. 2.52(c)(2). On the other hand, we have also held that a conviction for purposes of adjudging a defendant as a juvenile delinquent occurs not upon the plea but upon the entry of judgment. See United States v. Steven W., 850 F.2d 648, 649 (10th Cir. 1988)(citing Lott v. United States, 367 U.S. 421, 426 (1961) ("the plea itself does not constitute a conviction")), cert. denied, 488 U.S. 1012 (1988).

In short, "second or subsequent" can be read to describe either multiple events occurring at one time or multiple events occurring in a chronological sequence. "Conviction" can refer either to the return of a jury verdict of guilt or to the court's entry of judgment on that verdict. Accordingly, the text of the statute does not compel the construction that a second or subsequent conviction occurs when a defendant is charged in one indictment with more than one section 924(c) offense and a single judgment of conviction is entered on that indictment. Given the impossibility of discerning a plain meaning of "second or subsequent conviction" from the language of the statutory phrase, we conclude that the phrase is ambiguous.

When the plain language of the statute does not unambiguously reveal its meaning, we turn to the legislative history. See Blum

v. Stenson, 465 U.S. 886, 896 (1984). The legislative history regarding section 924(c) is sparse.

> "[Section] 924(c) was offered as an amendment on the House floor by Representative Poff, and passed on the same day. Accordingly, the committee reports and congressional hearings to which we normally turn for aid in these situations simply do not exist, and we are forced in consequence to search for clues to congressional intent in the sparse pages of floor debate that make up the relevant legislative history."

Busic v. United States, 446 U.S. 398, 405 (1980) (citations omitted).

One of the few relevant statements made with respect to the language in question is the following observation by Representative Poff, one of section 924(c)'s sponsors. He stated that the intended effect of the provision's minimum mandatory penalty was

> "to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time."

114 Cong. Rec. 22231 (daily ed. July 19, 1968) (emphasis added). Representative Rogers echoed Poff's statement: "[A]ny person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. And if he does it a second time, there will be a stronger penalty." Id. at 22237. As with the statutory language itself, these isolated statements could support either of

two equally plausible meanings. In our judgment, however, the legislators' repeated reference to committing a section 924(c) crime "a second time" does not compel a particular interpretation of "second or subsequent conviction."

Thus, "[n]either the wording of the statute nor its legislative history points clearly to either meaning. In that circumstance, the Court applies a policy of lenity and adopts the less harsh meaning." Ladner v. United States, 358 U.S. 169, 177 (1958); see also Bifulco v. United States, 447 U.S. 381, 387 (1980); United States v. Bass, 404 U.S. 336, 347-48 (1971); United States v. Freisinger, 937 F.2d 383, 391 (8th Cir. 1991) (construing ambiguous language in 924(c)(1) in defendant's favor in different context); United States v. Chalan, 812 F.2d 1302, 1317 (10th Cir. 1987) (same). This principle is equally applicable in construing sentencing provisions. See, e.g., Hughey v. United States, 110 S. Ct. 1979, 1985 (1990).

Application of the rule of lenity is particularly appropriate in this case. As we have pointed out, "[s]econd and subsequent offense statutes are admittedly harsh and must be strictly construed to avoid and protect against unintended applications." Rogers v. United States, 325 F.2d 485, 487 (10th Cir. 1963), reversed on other grounds and remanded for resentencing, 378 U.S. 549 (1964); see also Gonzales v. United States, 224 F.2d 431, 435 (1st Cir. 1955).

> "While in common parlance a verdict of guilty is said to be a conviction, it must be given its strict legal meaning when a second offense is made a distinct crime, carrying with it heavier penalties. The authorities overwhelmingly establish, first, that in the legal sense a conviction is a judgment on a plea or verdict of guilty; second, a second offense, carrying with it a more severe sentence, cannot be committed in law until there has been a judgment on the first; third, the indictment, charging the accused of being a second offender, must set forth the fact of the prior conviction, as that is an element of the offense in the sense that it aggravates the offense described in the indictment, and authorizes the increased punishment."

Singer v. United States, 278 F. 415, 420 (3rd Cir.), cert. denied, 258 U.S. 620 (1922). It is clear that, as did the statute at issue in Singer, section 924(c) creates distinct offenses rather than being merely a sentencing enhancement provision. See Simpson v. United States, 435 U.S. 6, 10 (1978); United States v. Adams, 771 F.2d 783, 787 (3d Cir.) (construing Special Dangerous Offender Act and distinguishing Singer as concerning statute creating second distinct offense), cert. denied, 474 U.S. 1013 (1985). Thus, the same principles of lenity and strict construction apply here that were applicable in Singer. We are not at liberty to interpret section 924(c) "so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Ladner, 358 U.S. at 178.

Although we have focused only on the statutory language and its legislative history thus far in our attempt to ascertain congressional intent, the Supreme Court has indicated that reference to other statutes may be appropriate as well. See, e.g., United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940). In American Trucking, the Court interpreted the Motor Carrier Act of 1935 in light of the Hours of Service Act, the Motor Vehicle Act, the laws governing the Civil Aeronautics Authority, and the subsequently enacted Fair Labor Standards Act. Significantly, the Court in American Trucking was "especially hesitant" to interpret the clause in question in a way that would deviate from the meaning of other related statutes because it was adopted as a floor amendment. See 310 U.S. at 546-47. In Dickerson, the Court likewise turned to related federal statutes and their legislative history. See 460 U.S. at 117-18.

These authorities support an interpretation of section 924(c) that is informed by the numerous statutes requiring the enhancement of a sentence because of the commission of a subsequent offense. Congress has enacted many statutes providing for enhancement on the basis of the commission of a second offense after a prior conviction. See, e.g., 18 U.S.C. § 3575(e) (1988) (special offender statute); 21 U.S.C. § 841(b)(1) (1988) (commission of drug crime after prior drug convictions); 21 U.S.C. § 844(a) (1988) (simple possession of drugs after two or more prior convictions); 21 U.S.C. § 845(a) (engaging in continuing

criminal enterprise after prior conviction); 21 U.S.C. § 859(b) (1988) (distributing drugs to minor after prior conviction); 21 U.S.C. § 860(b) (1988) (distributing or manufacturing drugs near school after prior conviction); 21 U.S.C. § 861(c) (1988) (employing minors to violate drug laws after prior conviction). The government has not pointed us to any federal enhancement statute in which a prior conviction was not required.

Moreover, in 28 U.S.C. § 994(h), Congress addressed the promulgation of sentencing guidelines applicable to defendants categorized as career offenders. Such defendants were there defined as those who, inter alia, had "previously been convicted of two or more prior felonies." Id. § 994(h)(2). The sentencing guideline implementing this directive, section 4B1.2(3), states that "[t]he term 'two prior felony convictions' means [that] the defendant committed the instant offense subsequent to sustaining at least two felony convictions." The guideline further states that the "date that a defendant sustained a conviction shall be the date the judgment of conviction was entered," thus precluding a conviction arising from the same indictment as the offense of conviction to be counted as a 'prior felony' for purposes of placing the defendant in the career offender category. Id.

We find particularly significant the sentence enhancement statute pertaining to illegally importing and exporting drugs, which doubles the otherwise authorized punishment in the case of a

"second or subsequent offense." See 21 U.S.C. § 962(a) (1988) (emphasis added). Congress in that instance specifically stated that "[f]or purposes of this section, a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of him under [laws relating to drugs] have become final." Id. § 962(b).

Finally, construing "second or subsequent conviction" to require that the offense underlying that conviction be committed after a defendant has received a judgment of conviction on the prior offense implements the legislative purpose upon which all such subsequent-offense statutes are grounded. These statutes were the subject of early attacks on the basis of double jeopardy. Defendants argued that the increased severity of the sentence for the second offense was in effect a second punishment for the first offense. In rejecting this argument, the Supreme Court stated that rather than punishing the defendant again for the first offense, "the statute 'imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform, for which it was designed.'" Moore v. Missouri, 159 U.S. 673, 677 (1895) (emphasis added). The purpose and construction of subsequent-offender statutes was also considered at length in Gonzales, 224 F.2d 431. The court there considered whether a prior conviction must occur before the commission of the subsequent offense in the context of the particular statute and

facts before it. However, its discussion of the purpose to be achieved by these types of statutes generally, and the construction which this purpose requires, is equally relevant here. The court pointed to the Supreme Court's language in Moore that we have quoted above as recognizing that "the reformation and retribution theories of punishment [are] the primary reasons for imposing greater penalties on the repeater." Id. at 433. The court reasoned that

> "if subsequent offender statutes are intended to reform the offender and deprive him by reason of his incarceration of the opportunity for continued criminal conduct, then such statutes would seem to apply properly only to offenders convicted prior to the subsequent offense, for the repetition of criminal activity after conviction would show the inadequacy of a first-offender penalty to perform this function and the need of increased penalties."

Id. (emphasis added).

We find this logic persuasive. A statute designed to punish a second offender more severely when he has not learned from the penalty imposed for his prior offense should not be construed to apply before that penalty has had the chance to have the desired effect on the offender. We thus conclude that the primary purpose of subsequent offense legislation "would be served best by applying the statutes only to those offenders who have been convicted prior to the commission of the subsequent offense." Id. at 434. Our conclusion is bolstered by the previously quoted

statements of Rep. Poff concerning the effect he intended this provision to have. See supra at 9.

In sum, we conclude that section 924(c) must be strictly construed. Moreover, because the text of the statute and its legislative history reveal an ambiguity concerning the construction Congress intended to give the words "second or subsequent conviction," we must apply the rule of lenity. Under this rule, the words "second or subsequent" mean events that are chronologically sequential, and "conviction" means judgment of conviction. Accordingly, we hold that a defendant may not receive an enhanced sentence under section 924(c) for a second or subsequent conviction unless the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense. We believe this construction is mandated by the applicable rules of statutory construction, is consistent with the other subsequent-offense statutes enacted by Congress, and best effectuates the purpose underlying such statutes generally.

We recognize that our holding is in conflict with United States v. Rawlings, 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987), and those circuits that have followed the reasoning of that case. See United States v. Raynor, 939 F.2d 191, 193-94 (4th Cir. 1991) (agreeing with Rawlings and holding that section 924(c) enhancement applies to defendant charged with

two counts in same indictment); United States v. Nabors, 901 F.2d 1351, 1358-59 (6th Cir.) (relying on "reasoning in Rawlings" to conclude that two separate 924(c) offenses charged in same indictment support enhanced sentences), cert. denied, 111 S. Ct. 192 (1990); United States v. Foote, 898 F.2d 659, 668 (8th Cir.) (agreeing with holding and reasoning of Rawlings), cert. denied, 111 S. Ct. 112 (1990); United States v. Bennett, 908 F.2d 189, 194 (7th Cir.) (same), cert. denied, 111 S. Ct. 534 (1990); see also United States v. Bernier, ___ F.2d ___ 1992 WL 8248 (2d Cir. Jan. 22, 1992) (per curiam) (noting holding in Rawlings line of cases and reaching same result). However, as discussed above, we simply cannot agree with those courts that the language and legislative history unambiguously demand the harsh construction those courts impose.[4] We find significant their failure to recognize that

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[4] The court in Rawlings observed that the habitual offender statute, 18 U.S.C. § 3575, specifically defined a special offender as one who has previously been convicted . . . [and] "imprisoned prior to the [instant] felony." Based on this observation, the Rawlings court concluded that where Congress intended to provide for enhancement on the basis of previous convictions, it did so explicitly. United States v. Rawlings, 821 F.2d at 1546. We do not find this argument persuasive given that section 924(c) was a floor amendment offered and passed on the same day.

We also disagree with the court's statement in United States v. Raynor, 939 F.2d at 194, that Congress's failure to specifically define "second or subsequent conviction" with respect to section 924(c) requires us to construe that section differently from the congressionally mandated construction in 21 U.S.C. § 962(b), see supra at 13-14. An equally plausible argument can be made that by using the word "conviction" in section 924(c), instead of the word "offense" used in section 962(a), Congress intended the same construction for both provisions without the necessity of a definitional provision in section 924(c) comparable to that in section 962(b).

section 924(c) must be construed strictly, and that the section contains a patent ambiguity arising from the undefined term "conviction." It is clear to us that at a minimum, a "second or subsequent conviction," strictly construed, requires more than one judgment of conviction, thus precluding the result reached in those cases.

Accordingly, we hold that Abreu and Thornbrugh were improperly given enhanced sentences for second or subsequent convictions under section 924(c). Such an enhanced sentence is only proper when the underlying offense has been committed after a judgment of conviction on the prior section 924(c) offense. The enhanced sentences under section 924(c) in both cases are REVERSED and the cases are REMANDED for resentencing. For a disposition of the remaining arguments raised individually by each appellant, we direct attention to the panel opinions in those cases.

No.. 89-4145 -- USA v. Abreu, and Nos. 89-5166 and 89-5173 -- USA v. Thornbrugh

BRORBY, Circuit Judge, dissenting, joined by TACHA and BALDOCK, Circuit Judges.

Certainly more futile exercises exist than dissenting, but at the moment I can think of none. Nevertheless, the conclusion reached by the majority compels my comment by way of dissent.

The two cases decided are legally identical. Each defendant committed multiple offenses, Thornbrugh having a propensity to commit bank robberies and Abreu a propensity to commit drug offenses. Both defendants utilized firearms in the perpetration of their multiple crimes. Ultimately, each was apprehended, charged with the multiple offenses in a single indictment and convicted of multiple felonies.

At sentencing, the district court applied 18 U.S.C. § 924(c), which reads: "In the case of his second or subsequent conviction ... such person shall be sentenced to ...." Thus, the district court enhanced each defendant's sentence for the second conviction which the jury returned simultaneously with the first conviction.

The sole issue to be decided is whether § 924(c) mandates an enhanced sentence when a defendant is convicted of two or more distinct § 924(c) offenses when the offenses are charged in the same indictment.

. The majority rejected the analysis employed by all six circuits that have previously considered the question presented. Instead, the majority concluded the statute was ambiguous, applied the rule of lenity, and held the statute applies only when the commission of a second offense is preceded by the entry of a judgment of conviction. The majority has thus rewritten 18 U.S.C. § 924(c) to read:

> Whoever, having been previously charged and convicted under 924(c) which conviction is evidenced by the entry of a judgment of conviction, then commits another § 924(c) offense shall be sentenced to ....

All six of the circuits that have previously considered this question have decided the statute is not ambiguous and have held a second conviction charged in the same indictment as the first triggers the enhancement provision of § 924(c).[1] The analysis employed by the Fourth Circuit in United States v. Raynor, 939 F.2d 191 (4th Cir. 1991), is illustrative. The Raynor court said:

> The plain meaning of the statute supports the conclusion that a conviction on a second firearms count, even though charged in the same indictment as the first, gives rise to the enhanced sentence. The statute directs enhancement for a "second or subsequent conviction." The second conviction is the one that follows the first, either in time or in a number sequence, and the subsequent conviction is any that follows the second, either in time or in a number sequence. The enhancement that is mandated by the statute does not depend on satisfying conditions that the second or subsequent conviction be by reason of a different indictment, or that the sentence be imposed on the first conviction before the enhancement can apply to the second, or that the defendant have served the sentence on the first. To construe the statute with such conditions would interject terms not included, and surely not intended, by Congress.

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[1] The majority opinion cites to these decisions.

Id. at 193. I am persuaded by this reasoning.

Our six sister circuits have likewise delved into the collateral issues including the legislative history, Congressional intent, Sentencing Guidelines, rules of statutory construction and analogous cases, and have come to the opposite conclusion from that enunciated by our majority. I embrace the reasoning and analysis as set forth by our sister circuits. I can add nothing to their analysis.

The majority's application of the rule of lenity deserves special comment. A statute is not deemed ambiguous "for purposes of lenity merely because it [is] possible to articulate a construction more narrow than that urged by the Government." Moskal v. United States, ___ U.S. ___, 111 S. Ct. 461, 465 (1990). Instead, lenity is reserved "for those situations in which a reasonable doubt persists about a statute's intended scope." Id. The rule of lenity applies only "'at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" Chapman v. United States, ___ U.S. ___, 111 S. Ct. 1919, 1926 (1991) (quoting Callanan v. United States, 364 U.S. 587, 596 (1961), and citing Moskal). The majority has, in effect, decided that § 924(c) is draconian and meant to apply only to a recidivist. This reasoning has driven the majority into the corral formed by Moskal and Chapman.

The fatal flaw in the majority's analysis may best be illustrated by a hypothetical factual scenario. Suppose a defendant commits two separate and distinct § 924(c) violations one year apart. Subsequently, he is apprehended and convicted of the first. Under the majority's holding, once the second crime is solved and defendant is charged and convicted, his sentence may not be enhanced because the commission of the second crime occurred prior to his conviction for the first. Even more extreme would be the defendant who escapes during his trial and commits a second § 924(c) offense prior to the entry of the judgment of conviction. Neither could his sentence for a second conviction be enhanced. But if the majority employed a plain language analysis to § 924(c), sentence enhancement would apply under either scenario.

Assuming, arguendo, the majority is correct in concluding § 924(c) may be read in more than one way, it is still impossible to reach the interpretation they suggest. The only other logical way to read this statute is that it requires the second or subsequent conviction to be charged in an indictment separate from the first. As the Fourth Circuit has aptly pointed out, reading that requirement into § 924(c) does nothing more than require prosecutors to go through the additional ministerial task of charging repeat offenders in separate indictments. See Raynor, 939 F.2d at 193. The only legitimate interpretation remaining allows a second or subsequent conviction charged in the same

indictment as the first to trigger the enhancement provisions of § 924(c).

If you pump enough water into a dry creek it becomes a river. The majority has pumped sufficient conditions into § 924(c) to transform it into a lenient vehicle for wrongdoers to ride.

I would affirm the enhanced sentences given to Mr. Abreu and Mr. Thornbrugh for their second and subsequent convictions.